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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 208.

HERBERT H. WAXHAM, DOING BUSINESS AS WAXHAM HATCHERIES,

Petitioner,

vs.

SAMUEL B. SMITH AND THE BUCKEYE INCUBATOR COMPANY,

Respondents.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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INDEX.

PAGE

Jurisdiction 1

Statement of the Case..... 2

Points Advanced by Petitioner for Allowance of the Writ and Now Presented for the Court's Consideration 3

The Disclosure of the Patent in Suit..... 4

The Claim in Suit Construed..... 7

Brief Statement of Petitioner's Construction and its Manner of Use..... 10

(i) *The Plain Import of the Claim is Wholly Consistent with the Long-Known Practice of Egg-Hatching, Whether Natural or Artificial*..... 11

(ii) *There is No Statement in the Specification of the Patent which is Inconsistent with the Plain Import of the Claim*..... 12

(iii) *The Patent Office Proceedings Necessarily Limit the Claim to the Precise Steps Stated* 14

(iv) *The Prior Art Imposes the Limitations for Which We Contend*..... 18

(v) *Any Other Construction of the Claim would Make it Functional and Void: It is Probably so in Any Event*..... 21

Petitioner's Incubator Does Not Infringe the Claim in Suit..... 24

APPENDIX:

Prior Adjudications of the Patent in Suit..... 27

TABLE OF CASES

	PAGES
Buckeye v. *Blum*, 27 Fed. [2d] 333, 334 (C. C. A. 6).	18, 29
Buckeye v. *Boling*, 46 Fed. [2d] 965 (C. C. A. 6)...	30
Buckeye v. *Cooley*, 17 Fed. [2d] 453 (C. C. A. 3)...	11, 27
Buckeye v. *Hillpot*, 24 Fed. [2d] 341, 344 (C. C. A. 3)	17, 27
Buckeye v. *Miller*, 41 Fed. [2d] 619 (C. C. A. 8)....	30
Buckeye v. *Petersime*, 19 Fed. [2d] 721, 722 (C. C. A. 6)	28
Buckeye v. *Wolf*, 296 Fed. 680 (C. C. A. 6).....	28
Busch v. *Jones*, 184 U. S. 598, 607.....	24
Corn Planter Case, 69 U. S. 320, 328.....	24
Expanded Metal Co. v. *Bradford*, 214 U. S. 366, 384.	24
Holland Furniture Co. v. *Perkins Glue Co.*, 277 U. S. 245, 256.....	22, 24
Hubbell v. *United States*, 179 U. S. 77, 83.....	17
I. T. S. Rubber Company v. *Essex Rubber Company*, 272 U. S. 429, 443-5.....	16
O'Reilly v. *Morse*, 15 Howard, 62, 113.....	24
Rajah Co. v. *Belvidere Co.*, 275 Fed. 761, 763 (C. C. A. 7)	8
Risdon Iron and Locomotive Works v. *Medart*, 158 U. S. 68, 77.....	24
Samuel B. Smith v. *E. H. Snow, et al*, 70 Fed. [2d] 564 (C. C. A. 8).....3, 23, 30	
Sargent v. *Hall Safe & Lock Co.*, 114 U. S. 63, 86...	17
Shepard v. *Carrigan*, 116 U. S. 593, 597.....	17
Smith v. *Magic City Club*, 282 U. S. 784, 789.....	17
Steward v. *American Lava Co.*, 215 U. S. 161, 167..	19
Weber Electric Co. v. *Freeman Electric Co.*, 256 U. S. 668, 677, 678.....	16
White v. *Dunbar*, 119 U. S. 47, 51.....	8

STATUTE CITED.

Judicial Code 240(a) (U. S. C. A. Title 28, Section 347)	1

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BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Jurisdiction.

This cause is here on a writ of certiorari granted by this Court October 8, 1934 on petition filed July 21, 1934.

The date of decree (R. 683) of the United States Circuit Court of Appeals for the Ninth Circuit to be reviewed was April 9, 1934, rehearing having been denied on June 15, 1934 (R. 684). The opinion of the Court of Appeals is printed at page 671, Vol. 1, of the record and reported in 70 Fed. [2d] at page 457.

The Jurisdiction of this Court was invoked under Judicial Code 240(a) as amended by act of February 13, 1925 (U. S. C. A. Title 28, Section 347).

Statement of the Case.

This is a suit in equity for alleged infringement of patent No. 1,262,860 (Vol. 2, p. 2) issued April 16, 1918 to Smith for Improvements in Incubators (for hatching eggs) brought in the United States District Court for the Southern District of California, Central Division,[1] by Smith, the patentee and owner of the patent, and The Buckeye Incubator Co., his exclusive licensee in certain fields.

Petitioner, defendant below, is the owner and operator of a hatchery located in the City of Van Nuys, California, and is sued because of his use of an incubator manufactured and sold by the Robbins Incubator Company, of Denver, Colorado. The manufacturer is not a party to the suit.

The bill of complaint charged infringement of claims 1 and 2 of the patent, both purporting to cover a method of hatching eggs in an incubator. The District Court, after trial before a Master, confirmed the reports (Vol. 1, pp. 27 and 90), holding claim 1 valid and infringed and claim 2 valid but not infringed, and entered a decree for injunction as to claim 1 and for nominal damages and costs (Vol. 1, p. 129). Both parties appealed from the decree but plaintiff abandoned its appeal as to claim 2.

This petition brings before this Court the decree of the Circuit Court of Appeals (Vol. 1, p. 683) affirming the District Court and holding claim 1 valid and infringed.

The material facts, as to the patent in suit, the prior art, and the petitioners' practice that is charged to infringe, are not disputed, and the questions presented are of law—to-wit, the validity and scope of the Smith patent.

On October 8, 1934, this Court also granted a petition for writ of certiorari in the case of *Samuel B. Smith* v.

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[1] Emphasis, by italics, in this brief is ours unless otherwise noted.

E. H. Snow et al., No. 102, October Term, 1934, involving the same claim in suit in the instant case. There the plaintiff below (*respondent* in the present proceeding) filed petition to review a decree of the Circuit Court of Appeals for the Eighth Circuit (70 Fed. [2d] 564) holding claim 1 valid, but not infringed by the use—*i. e.*, method of operation—of an incubator which is substantially identical with that operated by petitioner here, though it has the central corridor of Smith—which petitioner does not have.

A main ground advanced for the allowance of that petition was, that the practices attacked as infringements in both cases are the same, and that the Courts reached opposite conclusions.

The incubator of Snow and that of petitioner, as we shall show, are not operated in accordance with the teaching of the Smith patent in the arrangement and progressive movement of the eggs, and in respect of the air currents moving over the eggs.

The patent in suit has likewise been before the Courts of Appeals of the Third, Sixth and Eighth Circuits. In an appendix (p. 27) to this brief we give a synopsis of these earlier decisions.

Points Advanced by Petitioner for Allowance of the Writ and Now Presented for the Court's Consideration.

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding the claim in suit valid and infringed.

2. The claim in suit should not be accorded a scope sufficiently broad to read upon the operation of petitioner's incubator, because (*a*) of the clear intendment of the specification and claim; (*b*) of the limitations imposed by the prior art and (*c*) of the assertion, rejection and *cancellation* of broad method claims during the prosecution of the application for the patent.

3. The claim in suit is invalid, under well settled authority, as the mere functional statement of the operation of the specific structure shown and described in the patent.

The Disclosure of the Patent in Suit.

The patent in suit relates to a large sized incubator for hatching eggs. In the structure disclosed (Fig. 1, Vol. 2, p. 3), egg trays having meshed bottoms are arranged in two vertical tiers which are placed in each of two side chambers. The racks (9) nearest the upper end of the tier, in each side chamber, are stationary racks in which is located the fresh supply of eggs. Beneath these stationary racks is a series of tilting racks (10)[1] and at the bottom of each side chamber there is also a stationary rack (12) which is provided for holding three trays (13) of eggs which are about to hatch. Between the side compartments is a passageway (5) called a "corridor" which is partitioned by curtains on each side (3 and 4), which act as walls between the central corridor and the two side compartments. These curtains do not extend to the floor, but end several inches above it and just below the topmost of the three hatching trays at the bottom of the tier. The two side chambers contain the tiers of egg trays, while the central corridor is for air distribution to the chambers.

Motor driven fans (18) are positioned at the top of the central corridor in close relation to coils of heated pipes. The top of the incubator box is provided with an inlet opening (24) for admitting fresh air, and with outlets (28) for the release of foul air. The circulation of air is accomplished by the fan which forces air downwardly

[1] Tilting of the eggs during incubation has been common and follows the practice of the brooding hen, which turns the eggs occasionally so that the yolks will not break through the "white" and rest against the shell; which would spoil them. This is not involved in the controversy.

through the central corridor. The current of air strikes the floor of the corridor, passes under the lower ends of the curtains at either side of the corridor, upward through the stationary hatching trays and then up through the tiers of tilting egg trays, and back to the fan. None of the current of air moving down the corridor can escape from this passageway during its downward course, but all is directed in a divided stream under the lower ends of the curtains and into the bottom of each of the two closed compartments at the sides of the incubator wherein the eggs are located. Similarly in the upward travel of the air currents, all of the air is confined within the curtained compartments and must pass up through the trays of eggs.

The structure is thus described by the patentee (Vol. 2, p. 4, lines 65-73):

> "The invention comprises a walled chamber 2 * * * subdivided longitudinally by two parallel rows of curtains 3 and 4 to provide a central compartment or corridor 5 and side compartments 6 and 7" (containing the egg tiers).

In the use of the patented incubator, as described at lines 87-104 (Vol. 2, p. 4), new eggs are placed in trays in the top racks of the tiers and left there for three days, and thereafter every three days, during the next fifteen day period, the trays containing the eggs *are moved progressively downwardly in the tier.*[1] The total period of incubation is twenty-one days, and the specification provides for the placing of a new set of trays containing fresh eggs each three days, in the places left vacant

[1] As the specification provides (p. 1, lines 87-104), the trays of fresh eggs are placed in the uppermost racks 9, then moved downward, after three days, to the upper part of the "tilting racks" 10; then are shifted at three-day intervals from higher to lower planes in the tilting racks; finally, "when about ready to hatch", to the stationary racks 12 (Fig. 1) at the bottom.

by those trays which have already been shifted to a lower level in the tiers. When the eggs in a tray are about ready to hatch, the tray is moved into the stationary racks at the bottom of the egg compartments. These lowermost racks are below the level of the lower ends of the curtains (Figs. 1 and 3) which separate the tilting egg tray tiers from the central corridor, where they get the on-coming current of air, which enters the side egg-tier compartments beneath the curtain 3. This system of progressively adding new eggs in the tiers has long been known as "staged incubation".

The reason for the procedure as described in the specification, is that during the first half of the incubation period the eggs do not themselves generate sufficient heat to incubate properly (100° to 105°) so that heated air must be supplied to them; as the scientists say, the eggs are endothermic—absorbing heat. During the latter half of the period more heat is generated by the eggs themselves, as the embryos develop, than is required for proper incubation; they are exothermic; and for best results, the excess heat is carried away and transferred to the cooler eggs which are in the earlier stages of incubation and located in the upper trays in the tier. In the circulation of air in the Smith incubator, some of the old foul air is expelled through the outlets (28) and some new fresh and cool air is drawn in at the inlet (24), and moisture added by pipe (26). There is thus a constantly renewed or conditioned mixture of air and moisture, blown by the fans, to which has been added heat received from pipes (23).

By reason of the curtains, the air stream on its downward travel is confined in the corridor, and the curtains likewise confine and direct all of the air travelling upward through the egg tiers. The air is thus *compelled,* as the specification states, to move in defined channels. No air can escape around the edges of the trays in its upward travel, but all must pass through the "open mesh" *bottom* (Vol. 2, p. 4, lines 87-88; p. 5, lines 28-33) of each

of the incubating trays progressively from the lowest trays holding the warmest eggs, to those at the top holding the newly placed and coolest eggs. The compelled direction of air currents up through the trays is described in the specification (Vol. 2, p. 5, lines 56-73):

> "• • • it will be also noted that the vertical spaces 27 between the adjacent tilting racks 10 are closed at their lower ends by flexible strips of fabric[1] which are attached to and extend upward at each side of each rack so as to *compel the air to circulate through the mesh bottom* and around and about each egg as heretofore referred to, and as the eggs further advanced in incubation are contained in these lower trays and as the danger is that the temperature will rise in these eggs to a point injurious to incubation the improved method disclosed herein permits the circulating air to act as a medium to prevent the overheating at this stage of incubation and this is accomplished by promoting an induced draft within the lower trays."

The Claim in Suit Construed.

Some of the claims (4 and 5, not in issue) are directed to the *apparatus* described; but defendant's apparatus is so distinct that it never was even asserted to infringe them. Claim 1, which alone is in suit, is asserted in terms of method:

> "1. The method of hatching a plurality of eggs by arranging them at different levels in a closed chamber having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture and applying a current of heated air, said current being created by means other than variations of temperature and of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature, whereby the air will be vitalized, the moisture conserved and the units of

[1]The strips of fabric are shown in Figure 3 at the lower end of the space 27 but are wrongly designated "28" on the drawing.

heat will be carried from the eggs in the more advanced stage of incubation to those in a less advanced stage for the purpose specified."

a. The claim specifies a "method of *hatching* a plurality of eggs by *arranging* them at different levels". "Hatching" connotes incubation from commencement to completion and emphasizes that completion of the entire hatching procedure is of the essence of the method, which must extend over a period of twenty-one days. The important word *"arranging"* is clearly defined in the specification (Vol. 2, p. 5, lines 79-96) as initial placement of the eggs at one level followed by periodical relocation at successively lower levels until final hatching takes place at the bottom, where the heated and freshened (newly conditioned) air enters:

> "It, therefore, appears that the improved apparatus and method contemplates the application of hot air circulating in a column with such speed as to keep the temperature substantially uniform and so *arranging* the eggs that the fresh eggs are placed at one point in the column of air and held in a horizontal plane until they reach a predetermined stage of incubation and then put at a different point in the same column of air and kept in planes inclined to the horizontal and thereafter placed at such a point in the column of air that the forced draft of air acts to hold the eggs at a uniform temperature and to prevent them from becoming overheated and thereafter placing the eggs into final position for the hatching operation."

Thus the specification makes the meaning of the first step of Smith's method perfectly clear as to the patentee's intent, and furnishes its own glossary for the interpretation of the pregnant word "arranging" in the first clause of the claim.[1]

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[1] *White* vs. *Dunbar,* 119 U. S. 47, 51 near bottom; *Rajah Co.* vs. *Belvidere Co.,* 275 F. R. 761, 763, C. C. A. 7; and cases *passim.*

b. The chamber has "restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture" (28, at the top), and for "applying *a* current of heated air" (beneath the curtain at the bottom of the egg tiers is the opening for the current of heated air from the curtained corridor and the single current passes thence vertically upward between the eggs).

c. The only other step of the claim is the descriptive qualification of the air current, *i. e.*, that it shall be "created by means other than variations of temperature" —*e. g.* by fans as shown at 18 on the drawings—and that it shall be "of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature."

d. The rest of the claim is descriptive of the results achieved by the procedure, *i. e.*, "whereby the air [of the hatching compartment] will be vitalized, the moisture conserved, and the units of heat will be carried from the eggs in *the* more advanced stage of incubation"—*i. e.*, those eggs finally located at the bottom or hatching level, not in *a* more advanced stage—"to those in *a less* advanced stage for the purpose specified."

This interpretation of the claim is not only plain upon the face of the document but, as developed in our subsequent argument, it is

(i) Consistent with the undisputed facts as to incubation;

(ii) Not to be questioned by any statement elsewhere appearing in the specification;

(iii) Necessary to be accepted because of the history of the application in the Patent Office, since broader claims were made, rejected and canceled, and the terms now found were chosen after rejection, to avoid the prior art;

(iv) Imposed by the showing of the prior art;

(v) Any other construction of the claim would make it functional and void; it is probably so in any event.

Brief Statement of Petitioner's Construction and its Manner of Use.

As shown in the Report of the Master (Vol. I, pp. 43-46), which was accepted by the District Court (pp. 106-7) and Court of Appeals (p. 680, near middle), the petitioner's apparatus is a single large compartment containing two racks on which the egg-trays are placed, and in which the fans, heaters and water pans are located, the fans being on the rear wall; vents at the top permit the escape of foul air, and vents at the back admit fresh air. Trays of fresh eggs are put on the tilting racks, but as the Master says (R. 44):

> "*No particular order is followed* * * *. *The trays once placed are not moved until the eighteenth* day. At that time the eggs are placed in deeper trays and moved to the stationary or so-called hatching racks on the left. Here they are left until the chicks are hatched * * *. The two fans at the rear are operated at a speed of around 220 revolutions per minute. Being of large size they practically cover the wall of the chamber, and due to their close proximity to the wall act to drive the air *centrifugally towards the sides, top, and bottom of the chamber* and to draw the air inward at their center."

As thus described, the air currents pass over and about and between all the egg-trays promiscuously, both because the trays are arranged without any regard to their age of incubation, and because the air currents go out in all directions from the fans, and are not confined or directed. There are no curtains in petitioner's incubator to provide a directing "corridor" and "compel" the air to move in defined channels. The eggs after the 18th day are separated from all the others, and placed in racks at one side (R. 44, near bottom and R. 48, near bottom), not in racks below the incubating eggs. There is no relation between their final position and the fresher eggs with respect to any portion of the promiscuous air cur-

rents. Also, as stated (and it is undisputed), there is no progressive location and relocation of the eggs during the incubation period.

Smith's arranging of the eggs contemplates the original placement in a particular order and the progressive movement of the eggs downwardly in the tier at intervals during the full *twenty-one day* period until hatching is completed. As distinguished from this procedure, petitioner does not so arrange the eggs and on the 18th day they are moved out of their previous (single) location in the incubating compartment and placed in the hatching compartment.

This proposition, upon which petitioner rests, with other distinctions from Smith's prescribed method, will be considered after a further study of the five points that have been stated as bearing upon the true construction of the claim.

(i)

The Plain Import of the Claim is Wholly Consistent with the Long-Known Practice of Egg-Hatching, Whether Natural or Artificial.

The natural laws governing the incubation of hens' eggs have been known and availed of by artificial means from time out of mind. The Egyptians practiced the art in early history in apparatus each containing thousands of eggs, as Judge Woolley noted in his opinion upon this patent (*Buckeye* v. *Cooley,* 17 Fed. [2d], at page 453).

A period of twenty-one days is required to hatch; the eggs must be maintained at a temperature of about 102 degrees; fresh air (oxygen) must be supplied, at least at intervals. During the first ten days, mild heat must be applied, and during the last half of the period of incubation, the germination of life produces *heat* above the critical point, and *carbon dioxide,* both of which must be removed; while some moisture is required to prevent drying out. The changes in the life within the shell, and these outward manifestations, occur at progressive

intervals, to which the patented process—and all previous processes of artificial hatching—must be adapted.

The claimed process carries out this natural procedure in a closed chamber, which has suitable openings for ingress of fresh air and egress of foul air, and is divided into separate compartments by curtains which separate the central corridor where the air current is generated, from the side compartments where it is utilized. It comprises a complete "method of hatching", involving necessarily a twenty-one day cycle for each batch that is treated, and involves *arranging* each batch at different levels during the period, placing them first at one point in the column of air and holding them there until they reach a predetermined stage of incubation, then bringing them at succeeding intervals of time closer and closer to the ingress of air into the egg tier, so that in the more advanced stage, the heat given off will be carried to the eggs in a less advanced stage.

So the "method" is of an artificial character, but adapted to the 21-day cycle of hatching and to the other natural conditions that arise in that cycle, as it must necessarily be. It is only completed, with respect to any new batch of eggs, when the chickens are hatched.

(ii)

There is No Statement in the Specification of the Patent which is Inconsistent with the Plain Import of the Claim.

The patentee first described the *apparatus* (claims on which are not in issue here), and there—as in describing his method itself—points out the steps of the process to which it is adapted, as pertaining to a complete, or 21-day, cycle of hatching. Thus, at lines 19-40 (Vol. 2, p. 4), the patentee states that his—

> "• • • improved *system* contemplates that fresh eggs will be placed in a horizontal plane, • • • and after the eggs have been subject to the circulation of hot air for a predetermined time • • •

> they will be *placed* • • • *in a different location* but still subject to *the same column of air* • • • and after they have remained for a predetermined time they *will be again moved to a different* position with reference to the forced circulation of hot air • • • and in *this last named position* the air will be forced to pass between the different eggs and will in effect act as a cooling medium for the eggs."

In other words, the patentee makes it clear that *his system* (like his method) of hatching eggs is one in which the "arrangement",—*i. e.,* initial location and progressive change in location of the eggs at various stages of incubation, is of the essence. Nowhere is there even a suggestion that the patentee has discovered that the desired results can be achieved without following implicitly in the apparatus disclosed each of these steps which he specifies. By his *system,* in the progressive stages of incubation he cools the advanced eggs in the lowest trays by exposing them to the first impingement of air-current as it comes into the side compartment from below the curtain, and conveys the excess heat units up through the vertical tiers to the cooler eggs. There is no thought in the entire specification that by the expression "at different levels" he contemplated the placing of egg-trays in a tier in such a location as to alternate fresh and advanced eggs or set them indiscriminately in the tier. Likewise there is absolutely no hint that his system would permit of never moving a tray of eggs during the incubation period. The identical teaching as to procedure is repeated at a later point in the specification and by it the definition and significance of "arranging" is made plain (Vol. 2, p. 5, lines 79-96):

> "It, therefore, appears that the improved apparatus and method contemplates the application of hot air circulating in a column with such speed as to keep the temperature substantially uniform and *so arranging the eggs that the fresh eggs are placed at one point in the column of air* and held in a horizontal plane until they reach a predetermined stage of in-

> cubation and *then put at a different point in the same column of air* and kept in planes inclined to the horizontal and *thereafter placed at such a point in the column of air* that the forced draft of air acts to hold the eggs at a uniform temperature and to prevent them from becoming overheated and thereafter placing the eggs into final position for the hatching operation."

No other procedure than that which is thus reiterated as constituting the patentee's "improved system", "improved apparatus and method", is described in the specification.

(iii)

The Patent Office Proceedings Necessarily Limit the Claim to the Precise Steps Stated.

The file wrapper and contents of the patent in suit are included in Volume 2 at page 317 *et seq.*

The patentee first submitted 28 claims, mostly drawn in broad and comprehensive terms (Vol. 2, p. 325), but all of these were rejected and cancelled, except that original claim 24 (on the apparatus) was allowed after limiting amendments, as claim 4 of the patent. Smith then amended his specification to define more clearly the circulation of air currents from the warmer eggs in the hatching period of incubation to the newer and cooler eggs (Vol. 2, p. 4, lines 40-54). After further rejection of the method claims, applicant acquiesced in the rejection, and cancelled all of them (Vol. 2, p. 346), and then tried a new set (*id.*), still using terms broader than claim 1 of the patent, but they also were rejected (p. 350), then canceled, and a narrower set proposed by the applicant (p. 352) and they were in turn rejected (p. 355) and canceled (p. 357). It was not until the assertion of claim 1 as it appears in the patent (Vol. 2, p. 357) that any *method* claim was held allowable. The limitations of this claim, including its terminal clause, are limitations made necessary by the showing of the prior

art, and by the requirements of the Patent Office before it would allow the claim.

The extent to which the Patent Office compelled the applicant to insert limitations as a condition precedent to the grant of the patent, may easily be seen by paralleling the claim 1 (Vol. 2, p. 352) proposed on June 28, 1917 (after repeated previous attempts, rejections and cancellation) and thereafter rejected and canceled (Vol. 2, pp. 355 and 357), with claim 1 of the patent as issued.

Claim 1 of June 28, 1917	*Claim 1 of the Patent*
The method of hatching a plurality of eggs in different stages of incubation	The method of hatching a plurality of eggs by *arranging them at different levels*
	in a closed chamber having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture
by subjecting all of said eggs to heated air and *by supplementing the natural draft of the heated air* with the forced draft to increase the velocity of heated air about the eggs without changing the temperature of heated air	and applying *a current* of heated air, said current *being created* by means other than variations of temperature and of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature,
whereby the units of heat will be carried from the eggs in the more advanced stage of incubation to those in a less advanced stage.	whereby the air will be vitalized, the moisture conserved and the units of heat will be carried from the eggs in the more advanced stage of incubation to those in a less advanced stage for the purpose specified.

It is quite plain that *arranging the eggs, progressively, at different levels* and applying Smith's directed and con-

fined *current* of heated air to them, became material elements of the claimed invention. As we shall show under the discussion of infringement, petitioner does not employ either of them.

Under settled law such limitations may not be disregarded. Upon the following decisions of this Court, we submit that the claim in suit is limited by the proceedings in the Patent Office to the exact procedure disclosed in the specification, and stated in claim 1 as we have shown above.

Weber Electric Co. v. *Freeman Electric Co.*, 256 U. S. 668, 677, 678:

> "Having thus narrowed his claim against rotary movement in order to obtain a patent, the patentee may not by construction, or by resort to the doctrine of equivalents, give to the claim the larger scope which it might have had without the amendments, which amount to a disclaimer of rotation as an operative feature of his device. * * *
>
> "For the reasons thus elaborated, we conclude that the socket of the respondent does not infringe the fourth claim of the patent in suit * * * because the file-wrapper and the subsequent patent show that the disclosure is, and was intended to be, limited to a construction operative by direct longitudinal movement or thrust without such rotative movement."

I. T. S. Rubber Company v. *Essex Rubber Company*, 272 U. S. 429, 443-5:

> "The applicant having limited his claim by amendment and accepted a patent, brings himself within the rules that if the claim to a combination be restricted to specified elements, all must be regarded as material, and that limitations imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and looked upon as disclaimers. * * * The patentee is thereafter estopped to claim the benefit of his rejected claim or such a construction of his amended claim

as would be equivalent thereto. * * * So where an applicant whose claim is rejected on reference to a prior patent, without objection or appeal, voluntarily restricts himself by an amendment of his claim to a specific structure, having thus narrowed his claim in order to obtain a patent, he 'may not by construction, or by resort to the doctrine of equivalents, give to the claim the larger scope which it might have had without the amendments which amount to a disclaimer.'"

See also:

Smith v. *Magic City Club,* 282 U. S. 784, 789.
Sargent v. Hall Safe & Lock Co., 114 U. S. 63, 86.
Shepard v. *Carrigan,* 116 U. S. 593, 597.
Hubbell v. *United States,* 179 U. S. 77, 83.

The Third Circuit Court of Appeals, when it had the patent here in suit before it in the case of *Buckeye* v. *Hillpot* emphasized the fact that the proceedings in the Patent Office placed necessary limitations upon the interpretation of claim 1 (24 Fed. [2d] 341 at 344):

"There can be little doubt about that. The file wrapper clearly shows that Smith was forced at different stages of the patent prosecution so to limit his claims. *Moreover, the file wrapper points to the fact that the 'curtains' make 'a tight closure between the corridor and the compartments';* it speaks of 'air passageways' and 'vertically directed current'; it contains ten references to 'forced circulation of heated air,' six to circulation effected by 'currents' of heated air, six to 'columns of heated air' through 'columns of egg trays,' and it contains no reference to any other kind of air circulation. *Yielding to the demand of the Patent Office that the 'circulation of air shall be included and defined,'* Smith acquiesced in repeated rejections of his claims, proposed others and finally accepted those allowed, in each of which is embodied the conception of air movement by currents in defined channels."

The one limitation particularly stressed was held by the Court to exclude a construction and process which lacked (as do petitioner's) the *curtains.*

Likewise, the Court of Appeals for the Sixth Circuit recognized that the patentee of the patent here in suit is estopped to change his position from that which he had urged in the Patent Office when seeking the grant (*Buckeye* v. *Blum,* 27 Fed. [2d] 333):

> "Whether there is such a *fairly distinct current, as distinguished from the general agitation employed by the defendant* here, and in less degree by the defendant in the Petersime Case, is said to be of no practical importance in achieving the successful result. Perhaps so; and yet *dependence upon that theory, in order to sustain the patent, is required, both by the proceedings in the Patent Office and by the prior art,* including Smith's too old public use. Smith learned or knew he must differentiate in this respect in order to get his patent."

(iv)

The Prior Art Imposes the Limitations for Which We Contend.

It is unnecessary to review the prior art in detail because admissions are established by the plaintiff's testimony which are of themselves sufficient to show that the claim in suit must be strictly construed and limited to the essentials as disclosed in his described *system* or *method* of hatching eggs.

The patentee, and himself a party plaintiff, admitted that *staged incubation*[1] was old and that the use of forced circulation of air in large incubators was old—he himself had used commercially incubators with *forced fan circulation in 1906*—10 years before he applied for his patent (R. 545). Staged incubation is also shown in the

[1] "Staged incubation" being the incubation of eggs of various stages, placed at intervals in the apparatus, was admitted by Smith, in the Patent Office proceedings, to be old (Vol. 2, p. 348).

patented prior art; among others, the Winkler U. S. patent, No. 286,756 of 1883 (Vol. 2, p. 110), Zimmer No. 1,075,747 (Vol. 2, p. 265) and German patent to Stulik No. 155,917 of 1904 (Vol. 2, p. 306 at 314). Forced circulation of air in an incubator is shown in U. S. patent to Koons, No. 916,454 (Vol. 2, p. 247) and Fullington patent, No. 1,205,445 (Vol. 2, p. 297).

Plaintiff's own admission shows that all he did in 1915—the alleged date of his invention—was to add the curtains to his old incubator (R. 545), thus inclosing the tiers of eggs in a closed compartment and forming the central corridor, and "increasing the fan capacity" (R. 545). In regard to this last mentioned change Smith said:

> "The most important change in my opinion was increasing the fan capacity."

By well established law the mere increasing of the capacity of the fan could not be regarded as invention—forced circulation being admittedly old—for the reason that nowhere in his patent does Smith specify any particular speed of air movement or capacity of fan. *Steward* v. *American Lava Co.*, 215 U. S. 161, 167.

> "* * * it seems to us impossible to say that sufficient instructions are given on the supposed vital point. Again, no proportions are indicated; the number, size and position of the air holes, except that they enter the cylinder above the gas, are left at large, and if the plaintiffs' theory is the true one, the public are told little more than to try experiments until they find a burner that works."

His own admission but emphasizes the applicability of the rule of law (R. 547):

> "I would say that no invention resides in determining the speed or velocity of air currents for use in an incubator."

What the patentee really did in 1915 was brought out clearly on cross examination. At that time he abandoned

his former method of hatching eggs—which included staged incubation and forced circulation of air currents —and added the curtains which compelled the direction of the air currents downwardly through the corridor and *"upwardly through the oldest eggs to the newer or youngest eggs"* (R. 556):

> "I testified that I added the curtains to my Cleveland machine in 1915, and that is the machine which embodies the invention of the patent in suit.
>
> " 'x-Q. 297. And by means of those curtains you direct the air from fans upwardly through the oldest eggs to the newer or youngest eggs?
>
> "A. Yes, sir.'
>
> "I also increased the number of fans from one to three in 1915.
>
> " 'x-Q. 300. And so using these curtains in 1915 you abandoned your former method of hatching eggs without such curtains?
>
> "A. Yes, sir.' "

The German patent to Stulik (Vol. 2, p. 306, translation p. 312) shows staged incubation in which the fresh eggs are placed in the bottom trays, just above the port of entry of the hot air; "after some time" (p. 314 bottom) those eggs are removed to the next higher tray or compartment, and new eggs put into the lowest; and "this procedure is repeated", so that the eggs as they advance in incubation are moved toward the top, until those nearest hatching are just below "the air outlet *d*" at the top (Master's Report, Vol. 1, p. 35).

Stulik's process differed from plaintiff's in the reversed order of movement: *i. e.,* in applying the heated air entering the egg tiers to the fresher eggs first, and successively to the older eggs, from which, however, it would have removed any excess of heat. The claim in suit, however, distinguishes from this and other art (and from petitioner's practice as we shall show) by specifying that the eggs are so "arranged at different levels" that the "units of heat will be carried from the eggs in the

more advanced stage of incubation to those in a less advanced stage." This arranging, as shown above, means placing and replacing the eggs at three-day intervals, from top tiers finally to the bottom ones.

Likewise U. S. Patent No. 1,075,747 to Zimmer discloses staged incubation (Vol. 2, p. 269, lines 89-94):

> "I continue this process from day to day, supplying a new layer each day at the bottom of the incubating chamber and raising the other layers, so that the layers are disposed in the order of their ages, with the oldest eggs on top. I continue this for ten consecutive days."

Zimmer recognizes that after a given time the eggs give off more heat than is required and when they reach that condition, he reverses the eggs in the layers, placing the more advanced eggs at the bottom of the layer. He then extinguishes the heating lamp and allows the advanced eggs to give off heat to the less advanced and cooler eggs above (Vol. 2, p. 269, lines 100-125). The result is that during this latter period Zimmer has the eggs in his incubator located in the same relative position as Smith, with the more advanced eggs at the lower stages of the tier.

Thus we see that the admitted and established state of the art compels the narrow and precise construction above set forth.

(v)

Any Other Construction of the Claim would Make it Functional and Void: It is Probably so in Any Event.

If, as the respondent contends and the lower Courts found in the case, the claim be held to cover a procedure in which the eggs are *not* arranged by placing them in the trays successively from the top to the bottom, in a compartment closed by a curtain so that the entering single current of air first contacts with the eggs in the more

advanced stage of incubation, then what it is stretched to cover is, any procedure of artificially hatching eggs wherein a forced draft of air is blown through the incubator —provided, of course, the openings in the compartment and the current of air are of sufficient capacity to maintain an incubating range of temperatnres therein—on which essentials the patent gives no information. Manifestly, if any current of air is blown over a miscellaneous lot of articles, some at one temperature and some at another, it will necessarily equalize the general temperature in the chamber by removing "units of heat" from the warmer articles and delivering "units of heat" to the cooler articles. It is as much a law of nature that heat flows from a warmer object to a cooler one if put in proximity to it, as that a body of water permitted to move will flow from a higher to a lower level.

If the claim be construed as the Court of Appeals construed it and as respondents now contend, it is simply for the function that takes place in any enclosure containing eggs at different stages of incubation, into which a current of air is directed, or in which currents are generated by differences in temperature. But that, as we have seen, was old.

So to construe the claim is to do violence to the settled law as well exemplified in the comparatively recent case of *Holland Furniture Co.* v. *Perkins Glue Co.*, 277 U. S. 245, at page 256. This result follows from two considerations, both dwelt on in the opinion cited and both applicable here: to wit, that the inventor has shown but the one way of carrying out his asserted process and therefore is not entitled under the patent statute to a breadth of construction that would extend his process to practices and apparatus not described by him but attaining the same result; and, secondly, for the reason that it would make his claim cover the function, or the result, of his process rather than the steps which he has disclosed. The authorities are collected and discussed in the opinion cited, and

its application is direct and conclusive upon the case at bar.

Even in its limited interpretation, the claim or function is capable of being carried into effect only when the structure shown in the patent is utilized.

The central corridor and curtained compartments are structural features of the apparatus necessary for the direction of the air currents and the carrying out of the steps of the purported method. In the central corridor the necessary power fan or blower sets up a definite air current which splits at the bottom of the corridor and is compelled to ascend up through the curtained side compartment. Other necessary structural features are the restricted openings and trays for supporting the eggs at different levels.

Without the use of the particular features disclosed in the Smith patent—and plaintiff admitted that "our patent is very specific *in its drawings*" (R. 555)—the purported method *in its most literal sense* can not be practiced. As the Circuit Court of Appeals for the Eighth Circuit said (70 Fed. [2d] 564, 568) in the *Snow* case:

> "That is the way appellee has devised his apparatus; it is the only way revealed by the patent or in practice; and it is successful.
>
> "Claim 1 (and, also, claim 2) must be so limited to preserve either of them."

There are here no novel steps of operation independent of the particular mechanism for performing it. The method (aside from the manual placing and replacing of the eggs) can not be carried out by hand; and it cannot be practiced by any mechanism other than that specifically disclosed. Under well settled authority the claim is void. The so-called method of the claim in suit is merely the necessary function of the Smith incubator and is not patentable.

Smith has claims upon his apparatus, some of which have been litigated and sustained against those who have

appropriated his device, but no assertion is made that petitioner has done so.

The claim in suit upon mere function of the structure, is invalid.

O'Reilly v. *Morse,* 15 Howard, 62, 113.
Corn Planter Case, 69 U. S. 320, 328.
Risdon Iron and Locomotive Works v. *Medart,* 158 U. S. 68, 77.
Busch v. *Jones,* 184 U. S. 598, 607.
Expanded Metal Co. v. *Bradford,* 214 U. S. 366, 384.
Holland Furniture Co. v. *Perkins Glue Co.,* 277 U. S. 245.

Petitioner's Incubator Does Not Infringe the Claim in Suit.

Petitioner's incubator is unlike the Smith patent both in structure and in the manner of operating it. It does not embody a closed central corridor and side egg tiers in closed compartments separated from the corridor by curtains which direct into the lower part of each compartment a current of air, which has been conditioned in the corridor by the admixture of fresh air and the application of heat and moisture. Defendant, to the contrary, provides a single room structure, containing the fan, heaters and water pans, also the egg tiers, and it does not have any "corridor" or "compartments" at all. Unlike the Smith structure, there are two fans located *on the rear wall of the incubator*—not at the top of a closed corridor. The air streams travel from the center of the fan towards the tips of the fan blades, strike the walls, ceiling and floor, moving forward along them, some currents striking the front wall, and then in broken-up currents rearwardly *between* the trays, to the eyes of the fans (Master's report, R. 45), not to the backs of the fans as in Smith. There is no air stream directed *down* through a closed

corridor, and confined and compelled to move *up* through the mesh-bottomed trays stacked in a curtained compartment.

In the patent in suit, the hottest eggs nearest hatching are at the bottom of each tier and the heat which they give off is carried by the ascending current of air to the newer and cooler eggs which require heat to be added in order to incubate (Spec. Vol. 2, p. 5, lines 61-73):

> "• • • so as to compel the air to circulate through the mesh bottom and around and about each egg as heretofore referred to, and as the eggs further advanced in incubation are contained in these lower trays and as the danger is that the temperature will rise in these eggs to a point injurious to incubation the improved method disclosed herein permits the circulating air to act as a medium to prevent the over heating at this stage of incubation and this is accomplished by promoting an induced draft within the lower trays."

This arranging of the eggs is entirely foreign to petitioner's practice for he places his trays of eggs *indiscriminately* in the tiers and does not arrange the newer eggs at the top of the tier nor progressively move the trays downward every three days as Smith teaches.

Petitioner's trays are never *shifted* in position until the last three days, when the eggs are ready to hatch and then the trays are taken from the racks and transferred to hatching trays which are placed at one side of the incubator, entirely apart from the tier of incubating eggs—not under cooler eggs in earlier stages of incubation, and having no relation to an air current directed up through a tier.

The claim in suit is not infringed by a practice in which the egg trays are set promiscuously, *but permanently for 18 days,* in the tiers and in which the air currents are passed rearwardly across and between the trays. This practice is directly contrary to the essential steps

of the Smith patent for there the air must pass down through a closed central corridor and up through the egg trays arranged in the curtained compartments, so as to carry the units of heat "from the eggs in the more advanced stage of incubation to those in a less advanced stage" during the entire twenty-one day period.

As defendant hatches the eggs, they are not arranged by placing the fresh eggs at the top of the tier, held there a predetermined time and then progressively moved to lower points in the same column until hatching is completed, as the disclosure of Smith requires (*supra*, p. 12; spec. Vol. 2, p. 5, lines 79-96) and as specified in the claim in suit by the words "arranging them at different levels". The claim is clearly inapplicable to petitioner's method of hatching eggs.

We submit that the claim, if valid at all, is not infringed; that the decree below should be reversed, and the bill dismissed, with costs in all the Courts.

Respectfully submitted,

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APPENDIX.

Prior Adjudications of the Patent in Suit.

Third Circuit Cases:

Buckeye v. *Cooley,* 17 Fed. [2d] 453. The Court of Appeals for the Third Circuit affirmed the District Court (not reported) as to validity and infringement of claims 1, 2 and 3. Apparently the defendant's structure was a copy of that of the patent in suit for there was no effort to determine the exact meaning or scope of the claims. Judge Woolley wrote the opinion and it is significant that he made the following remark in his later opinion when the patent again came before his Court in a suit against a different defendant:

> "In the *Cooley* case, infringement was so plain there was no occasion to construe the claims."

In this latter case which we next discuss, there was held to be no infringement.

Buckeye v. *Hillpot,* 24 Fed. [2d] 341. After its opinion in the *Cooley* case, the Circuit Court of Appeals for the Third Circuit held claim 1 not infringed by the use of an incubator which was substantially identical with that shown in the Smith patent in that it included the central corridor and side tiers of egg trays of Smith, and in its use defendant had staged incubation, but it did not have *the curtains of Smith for directing the air currents* in accordance with his teaching. At page 344 of the report the Court said:

> "Looking for the invention by reading the claims in the light of the specification and the file wrapper history of the patent prosecution, one fixed and definite thing is disclosed, first with reference to its presence in the apparatus and next with reference to its use in the methods. This is a 'corridor' between

> tray tiers, and a corridor of a kind defined by its purpose. • • •
>
> "Turning to the specifications for light upon the claims, we find nothing there suggested in respect to air movement except by currents in predetermined directions. With all this before him what did Hillpot do? He simply omitted curtains. He thus transformed the corridor of Smith into the passageway of the old art."

Petitioner's incubator, like that of Hillpot, does not have the Smith curtains to direct the air current and it also does not have the central corridor of the Smith patent and does not employ the Smith teaching of arrangement of eggs.

Sixth Circuit Cases:

The patent in suit has been before the Court of Appeals for the Sixth Circuit in four different cases. In the first case (*Buckeye* v. *Wolf,* 296 Fed. 680) the structure involved was almost identical with that of the patent in suit and infringement was practically conceded. All of the claims of the patent, including both method and detailed apparatus claims, were held valid and infringed, affirming the District Court. Neither the Court of Appeals nor the trial court discusses the meaning or scope of the single claim in suit in the present case. As to infringement the lower court remarked (291 Fed. 253, at 256):

> "The claims need not be specifically stated. No question of invention or infringement turns on a close construction of all or any of the claims."

In the case of *Buckeye* v. *Petersime,* 19 Fed. [2d] 721, 722, the Court of Appeals affirmed Judge Hickenlooper (not reported) in holding that there was no infringement of method claims 1, 2 and 3:

> "Looking to the language of the claims, as indeed to the device that Smith uses, it would seem that

> he had in mind a process by which the warm air taken into the corridor would be currently directed, so as to strike first the eggs in the more advanced incubation, take to them the additionally needed oxygen, and carry the heat units therefrom to other parts of the two compartments, thus effecting, in part, at least, a uniformity of temperature throughout the egg chambers. This interpretation, we think, is borne out by the specifications. They refer to a 'forced circulation of hot air,' to subjecting the eggs to a 'column of air,' to moving the eggs to a different position 'with reference to the forced circulation of hot air,' to forcing the air 'to pass between the different eggs' which will in effect 'act as a cooling medium' for the more advanced eggs, all of which contemplate a defined current of air by which certain eggs may be cooled and given the additionally needed oxygen, and others may be warmed by the heat units which the current carries from the more advanced eggs. The file wrapper history of Smith's patent tends to support the same conclusion. This conception of a current of air driven in a definite or predetermined direction is different, we think, from the Petersime process, by which diffusion of heat units and uniformity of temperature is obtained by the slow stirring or agitation of the air in the egg chamber.''

Again in *Buckeye* v. *Blum,* 27 Fed. [2d] 333, the Sixth Circuit Court of Appeals affirmed Judge Westenhaver in holding that the operation of defendant's incubator did not infringe claim 1, pointing out that Smith's *distinct air current* is essential in order to find infringement, saying (at 334),

> ''• • • dependence upon that theory, in order to sustain the patent, is required, both by the proceedings in the Patent Office and by the prior art, including Smith's too old public use [he had used forced circulation *without curtains* as early as 1906]. Smith learned or knew he must differentiate in this respect in order to get his patent.''

The fourth case which came before that Court (*Buckeye* v. *Boling,* 46 Fed. [2d] 965) was a suit brought by one who was a defendant in an earlier suit in the Court for the District of Indiana, and it was sought to enjoin a suit for infringement in the Courts of the Sixth Circuit because of the earlier decree in the Indiana case dismissing the bill for non-infringement. The Court of Appeals, in denying the injunction and dismissing the bill on the ground that there appeared in the structure there involved changes from that which had been passed upon by the Court in Indiana,[1] again referred to the limitations of the "closed corridor" and the directed air currents of the Smith patent.

Eighth Circuit Cases:

The Smith patent has been twice before the Court of Appeals for the Eighth Circuit. In the first case, *Buckeye* v. *Miller,* 41 Fed. [2d] 619, the structure involved was an *original machine* said to be made under the Smith patent, but defendant modified it to get increased capacity and the Court held that these changes were not legitimate repair but an illegal reorganization. Under the doctrine of comity the patent was treated as valid and the scope of the claims was not discussed.

A few days after the decision in the case at bar, the Court of Appeals for the Eighth Circuit rendered its decision in the *Snow Case* (70 Fed. [2d] 564) which is now before this Court on certiorari (No. 102—October Term, 1934) holding claim 1 valid but not infringed. The Court carefully analyzed the disclosure of the specification, and concluded that the *arrangement of the eggs* and the *control and direction of the air currents* are essential features of the Smith patent, and that claim 1 must be limited to the procedure specified (at 567, 568):

> "The reasons for this particular positioning of the eggs are made clear in the patent. All through the

[1] The Indiana case, *Buckeye* v. *Boling* is not reported.

specifications and in each of the method claims runs the purpose of carrying the excess heat of the advanced eggs away from them in order to keep them below 105 degrees and of conveying such heat units to the earlier eggs in order to help maintain them at about 100 degrees. The last above quotation afforded an arrangement, location, and change of location of eggs in three progressive stages of incubation which would work out the very idea of cooling the advanced eggs and conveying their excess heat units to the cooler eggs. * * *"

"From the above, it would seem that the *arrangement, location, and change in location of the eggs at various stages of incubation was an essential feature of the disclosure.* Nowhere is there a suggestion that the patentee has discovered that the desired results can be reached without or by some other arrangement, location or changes. Having disclosed this as an essential of his method with no hint, revelation, or teaching to the contrary the broad claim to arrangement of the eggs 'at different levels' cannot be extended to an arrangement of trays in a tier which alternates fresh and advanced eggs and where a tray is never moved from its position during the entire incubation period. The disclosure is limited to positions, in the egg column, of eggs in different 'stages' of incubation and the change or shift of such positions—the eggs in the 'early' stage of incubation are in one position where they remain a 'pre-determined time' when they are shifted to another place in the column; from this second position, they are (after remaining a 'pre-determined time') again shifted to a third position in the column."

So limited, the claim is not infringed by either the incubator before the Court in the *Snow* case or the incubator operated by your petitioner (at 568):

"Appellants' device is based on an entirely different method. As to arrangement of eggs, it mixes up those in various stages of incubation—not in the same tray but as to trays, there is no part of the egg column set aside to eggs in a particular stage but trays of

eggs in one stage are layered in with trays in other stages in a predetermined order. Another difference is that a tray is never moved when once placed in the column. As to the air currents, the arrangement is different. The conception and operation of appellee's device is a column of air passing through the column of eggs in a definite direction—from eggs in advanced stages to those less advanced. In appellants' device, the conception and operation is a wide, general diffusion of air kept moving around all of the eggs without relation—as to direction—to the location of eggs in particular stages of incubation. In fact, the arrangement of eggs by appellants could not permit of such directioning of air currents.

"Thus differing in both essentials of the patent—arrangement of eggs and air current—from the device disclosed by the patent, appellants' device is not infringing."